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No. 83-586

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N. V.,
Petitioner,
vs.
MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, INDIVIDUALLY AND AS MEMBERS OF, GERALD H. GOLDBERG, INDIVIDUALLY AND AS EXECUTIVE OFFICER OF, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the lower courts erred in holding that Shell Petroleum N.V. lacks standing to challenge pending tax proceedings involving two of its domestic subsidiaries, Shell Oil Company and Scallop Nuclear, Inc.;

(2) Whether the lower courts erred in holding that the controversy is not ripe for adjudication because (a) no tax assessments have been issued against Scallop Nuclear, Inc., and (b) though proposed assessments for some of the years in question have been issued against Shell Oil Company, such assessments are still in the process of administrative review.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Statement of the Case	1
Introduction	1
Relevant Facts Omitted from Petition	3
Disposition Below	8
Reasons Why the Writ Should be Denied	
I. The Lower Courts' Holdings on Standing and Ripeness are Fully Consistent with Established Principles and Thus Do Not Present Important Questions of Law Which Need to be Resolved by this Court	9
A. The Standing Question	10
1. The standing issue is whether SPNV may challenge the Board's actions against Shell Oil and Scallop Nuclear	10
2. SPNV lacks standing under the settled rule that only a corporation and not its stockholders can complain of injury or wrong done to the corporation	11
3. The Board's actions against Shell Oil and Scallop Nuclear do not threaten any individual rights of SPNV	14
a. Rights which SPNV may hold under the Dutch FCN treaty do not pertain to either federal or state taxation of domestic subsidiaries	14
b. The tax treatment of Shell Oil and Scallop Nuclear does not involve any distinct constitutional rights of SPNV	20

4. The lower courts properly declined to read the treaty provisions as creating an implied right of action in SPNV. 21

B. The Ripeness Question. 22

II. Expedited Consideration of the Constitutional Claims Would be Inappropriate. 27

Conclusion 30

Appendices

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner
387 U.S. 136 (1967) 23, 24

American Power & Light Co. v. S.E.C.
325 U.S. 385 (1945) 13

Burnet v. Brooks
288 U.S. 378 (1933) 16, 21

Container Corp. v. Franchise Tax Board
103 S. Ct. 2933 (1983) 2, 9, 10, 18, 27, 30

Davenport v. Dows
85 U.S. 626 (1874) 12

Fair Assessment in Real Estate Ass'n, Inc. v. McNary
454 U.S. 100 (1981) 25, 26

Forbes v. Memphis
9 F. Cases 408 (F. Case No. 4,926) (1872) 12

Gladstone, Realtors v. Village of Bellwood
441 U.S. 91 (1979) 3, 13

Gregory v. Mitchell
634 F.2d 199 (5th Cir. 1981) 12

Hawes v. Oakland
104 U.S. 450 (1882) 12

Huntington v. Palmer
104 U.S. 482 (1882) 12

Japan Line, Ltd. v. County of Los Angeles
441 U.S. 434 (1979) 20

Koster v. Lumbermans Mutual Co.
330 U.S. 518 (1947) 12

Langdon v. Hillside Iron & Coal Co.
41 F. 609 (1890) 12

McCulloch v. Sociedad Nacional de Marineros de Honduras
372 U.S. 10 (1963) 26, 27

McDaniel v. Painter, 418 F.2d 545 (10th Cir. 1969) . 12

Meyer v. Fleming
327 U.S. 161 (1946) 12

Mobil Oil Corp. v. Commissioner of Taxes
445 U.S. 425 (1980) 2, 21

O'Shea v. Littleton
414 U.S. 488 (1974) 13

Patsy v. Board of Regents
457 U.S. 496 (1982) 25

Pittsburgh & W. Va. Ry. v. U.S.
281 U.S. 479 (1930) 12, 13

Rhode Island Hospital Trust Co. v. Doughton
270 U.S. 69 (1926) 20

Ross v. Berhard
396 U.S. 531 (1970) 12

Russian Volunteer Fleet v. United States
282 U.S. 481 (1931) 20

Schaffer v. Universal Rundle Corporation
397 F.2d 893 (5th Cir. 1968) 12

Sherman v. British Leland Motors, Ltd.
601 F.2d 429 (9th Cir. 1979) 12, 13

Sierra Club v. Morton
405 U.S. 727 (1972) 11

Simon v. Eastern Ky. Welfare Rights Org.
426 U.S. 26 (1979) 10, 13

Smith v. Martin
542 F.2d 688 (6th Cir. 1976), cert. den., 431 U.S. 905 (1977) 12

Sumitomo Shoji America, Inc. v. Avagliano
457 U.S. 176 (1982) 15, 17, 18

United States v. Pink
315 U.S. 203 (1942) 20

Valley Forge College v. Americans United
454 U.S. 464 (1982) 11

Vincel v. White Motor Corp.
521 F.2d 1113 (2d Cir. 1975) 12

Von Brimer v. Whirlpool Corp.
536 F.2d 838 (9th Cir. 1976) 12

Warth v. Seldin
422 U.S. 490 (1975) 3, 13, 22

UNITED STATES CONSTITUTION

U.S. Const. Art. I, §8, Cl. 3 (Foreign Commerce Clause) 9, 10, 20, 21, 29

U.S. Const. Art. III, §2 (Federal Judicial Power Clauses) 11, 13, 22

U.S. Const. Amend. XIV, §1 (Due Process Clause) . 20, 21

TREATIES

Convention of Establishment between the United States and France, entered into force December 21, 1960, 11 U.S.T. 2923, T.I.A.S. No. 4625 17

Treaty of Friendship, Commerce and Navigation between the United States of American and the Kingdom of the Netherlands, entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 394 passim

STATUTES

26 U.S.C. §61 18

28 U.S.C. §1341 (Tax Injunction Act) 20, 26

42 U.S.C. §1983 25

Cal. Rev. & Tax. Code §26103a 24

OTHER AUTHORITIES

Airgram from the Department of State to the Embassy at The Hague dated July 3, 1953 16

Annotated draft FCN for Portugal prepared by Herman Walker, 1947-1948 17

Deperon, *International Double Taxation*, the Advisory Committee on Economics to the Committee on International Economic Policy, League of Nations (1945) 16

HICG Bonn Despatch No. 2255 of February 17, 1954 16, 29

Letter of E.M. McCracken, Jr., dated August 28, 1980, reproduced in California's Bank and Corporation Tax Vol. IV, *Unitary Method of Apportionment: A Second Look*, Assembly Revenue and Taxation Committee (1980) 30

Letter from Secretary of State to Ambassador of the Netherlands dated December 20, 1979 14

Memorandum to the American Embassy at Chungking for Use in Negotiating Treaty of Friendship, Commerce and Navigation with China 17

Memorandum to the American Embassy at Rio de Janeiro for Use in Negotiating Treaty of Friendship, Commerce and Navigation between the United States and Brazil 17

Note from Charge d'Affaires a.i. of the Netherlands to the Secretary of State dated September 18, 1979 14

Note, *Multinational Corporations and Income Allocation Under Section 482 of the Internal Revenue Code*, 89 Harv. L. Rev. 1202 (1976) 3

Paris Despatch No. 2001 of April 22, 1959 17

The Sacramento Bee, September 14, 1983, page A13, col. 1 27

S. Exec. Rep. No. 12, 86th, Cong., 2d Sess. 5 (1960) 17

Statement of Donald T. Regan, Secretary of the Treasury, September 23, 1983 28

Testimony of John Walker, reproduced in California's Bank and Corporation Tax Vol. V, *Interim Hearing on Unitary Method of Taxation*, Assembly Revenue and Taxation Committee (1980) 30

Tr. of Oral Arg. *Chicago Bridge & Iron Company v. Caterpillar Tractor Co., et al.*, No. 81-349, April 19, 1982 20

United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, U.N. Doc. ST/ESA/102 (1980) 16, 28

Wall Street Journal (Western Ed.), September 28, 1983, page 8, col. 2 27

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 709 F. 2d 593.

STATEMENT OF THE CASE

Introduction

This is an action for declaratory and injunctive relief against California taxing authorities who are in the process of determining the corporate income tax liability of Shell Oil Company ("Shell Oil") and Scallop Nuclear, Inc. ("Scallop Nuclear"), two companies doing business in the State. Petitioner is Shell Petroleum N. V. ("SPNV"), a company of the Netherlands which is the parent of Shell Oil and the grandparent of Scallop Nuclear. Respondents are the members and

executive officer of the Franchise Tax Board ("Board"), the State agency which administers the California Bank and Corporate Tax Law.

The specific complaints of SPNV relate to the State's use of the unitary business/formula apportionment method of taxation recently considered by this Court in *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983). This method of taxation entails the formula apportionment of corporate income derived from a unitary business conducted both within and without the State and is designed to reflect contributions of the various elements of a unitary business to the profitability of the business as an economic whole. A separate accounting approach is disfavored in such an instance because it "is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." *Container*, *supra*, at 2946; see also *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 439 (1980).

Because formula apportionment is employed to ascertain the true value of a taxpayer's in-state contributions to the profitability of the unitary business as a whole, its use does not constitute an attempt to tax extraterritorial values. SPNV obviously is unwilling to accept this basic tenet. In its Statement of the Case, it refers to "California's eight-year-long campaign *to tax the earnings of petitioner . . . and its more than 900 Royal Dutch/Shell worldwide subsidiaries and affiliates*," and represents to the Court that an underlying issue in the case is "whether the 'upstream' application of a unitary tax scheme *to reach the income of a foreign parent company and its non-United States subsidiaries and affiliates*" is unconstitutional. Petition for Writ of Certiorari (hereinafter "Pet.") at 2 (emphasis added); see also Pet. at 20 ("Shell Oil and Scallop Nuclear are mere hooks on which the Board hangs its endeavors to reach SPNV's income from foreign sources").

If SPNV's perception of the unitary business/formula apportionment method were accurate, the method would have been invalidated long ago. To the contrary, this Court has repeatedly upheld it as a reasonable and valid means of determining the amount of corporate income fairly attributable to sources within a particular taxing jurisdiction. Further, this Court implicitly recognized in *Container* that, given the existence of a unitary business, the use of formula apportionment is likely to produce results which are more

accurate than those produced by a separate accounting approach. The unitary business/formula apportionment method takes into account what has been termed "the benefits of synergy" of a unitary enterprise.[1] A separate accounting approach, even with adjustments for transactions between related corporations, ignores this element.

Relevant Facts Omitted from Petition

SPNV has failed to recite in its petition for review a number of facts which are particularly relevant to the ripeness of the controversy. By such omissions, SPNV has also placed an improper connotation on a number of facts which it relates.[2]

The Board's field audit of Shell Oil for income years 1967-1971 was commenced on October 23, 1972, when the auditor originally assigned to the Shell Oil account met with Shell Oil representatives at their office in Houston, Texas. Affidavit of Howard Maycox ("Maycox Aff."), ¶6. During that meeting, basic audit procedures were established. *Id.* Among other things, the Shell Oil representatives were advised that the question of unity between Shell Oil and the other Royal Dutch/Shell companies would have to be investigated during the course of the audit. *Id.* It was understood that the audit would consist of two phases: an audit of Shell Oil and its subsidiaries as filed on a domestic combination basis, and an investigation of the question of unity with the Royal Dutch group. *Id.*

As the first phase of the audit was nearing completion in July 1974, the Board auditor made his initial request for information pertaining to Shell Oil's immediate parent and all subsidiaries in which the parent had an interest in excess of 50 percent. *Id.*, ¶11. This

1. See Note, *Multinational Corporations and Income Allocation Under Section 482 of the Internal Revenue Code*, 89 Harv. L. Rev. 1202 (1976), 1214-1216.

2. SPNV cites *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) as authority for the proposition that, for purposes of standing, the facts asserted in affidavits submitted on SPNV's behalf in connection with its motion for summary judgment and in opposition to the Board's motion for dismissal, as well as the facts alleged in its complaint, must be assumed to be true and construed in its favor. However, the Board opposed SPNV's motion for summary judgment on standing and ripeness grounds; a number of affidavits and exhibits were filed in support of the Board's opposition; and the District Court both granted the Board's motion to dismiss and denied SPNV's motion for summary judgment. Under such circumstances, it would seem appropriate to evaluate both the questions of standing and ripeness in view of all the materials of record. Cf., *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109, 115 & n. 31 (1979).

request was renewed in December 1974. *Id.*, ¶13. Shell Oil declined to cooperate, advising the auditor in January 1975 that the company would not furnish information on its parent because Shell Oil's liability could be correctly determined from the records of Shell Oil alone. *Id.*, ¶16.

The parties met on February 7, 1975 and May 2, 1975 in an effort to resolve the audit dispute. *Id.*, ¶¶18, 20. At the conclusion of the second meeting, Shell Oil representatives agreed to furnish published reports for the Royal Dutch group for all audit years. *Id.*, ¶20. At the next meeting, held on August 11 and 12, 1975, they were again asked to furnish such reports. Affidavit of Sam Kashiwagi ("Kashiwagi Aff."), ¶4. They were also told that a "test check" of worldwide combination would be made. *Id.*

The auditor received the requested annual reports on September 10, 1975. *Id.*, ¶5. On April 1, 1976, he submitted schedules to Shell Oil which roughly reflected the tax consequences of a worldwide combination report. *Id.*, ¶6. He received a response from Shell Oil dated April 23, 1976, discussing other cases involving integrated oil companies. *Id.*, ¶7. By letter dated May 11, 1976, the auditor replied:

> "In accordance with *the mutually agreed approach to the problem*, we have developed figures on a multinational basis to enable your staff to appraise the situation and place it in its proper perspective before proceeding further with the examination on unity between Shell Oil Company and the other companies in the Royal Dutch/Shell group. The schedules, *reflecting your proposals to which we agreed* to [sic], were sent to you with our letter of April 1, 1976.
>
> "The determination of whether or not a group of corporations is engaged in a unitary business involves the necessity of gathering a great deal of facts and figures from various sources.
>
> "In the interest of approaching the matter from a practical standpoint, and to relieve your staff with the burden involved in obtaining such information, we advised you that in accordance with the discussion in Reg. 25120 (b)(1)(2) and our experience with other oil companies, the nature and structure of the integrated oil companies give indication of being inherently unitary under California guidelines. Consequently, we offered to forego the data gathering at this time providing you

will agree in writing not to make 'unity of operations' an issue." Supplemental Affidavit of J. Lloyd Kennedy filed on behalf of SPNV ("Kennedy Supp. Aff."), Exhibit 2 (emphasis added).

On September 7, 1976, the auditor again met with Shell Oil representatives to discuss revisions to audit schedules. Kashiwagi Aff., ¶8. At the conclusion of that meeting, he gave the Shell Oil representatives a copy of a questionnaire on unity. *Id.* A revised questionnaire was forwarded to them on September 21, 1976, along with a request that answers be submitted by December 31, 1976. *Id.* 9.[3]

The auditor thereafter maintained contact with the taxpayer, repeating his request for responses to the questionnaire. *Id.* In May 1977, he was advised that Shell Oil's tax department had made substantial progress and that the requested data would probably be available by mid-June, after top management approved its submission to the Board. *Id.*, ¶10.

The next communication was a 30-page letter dated September 6, 1977, in which Shell Oil broadly stated the reasons why, in its opinion, application of the unitary concept was inappropriate (e.g., "Intercompany sales as between Shell Oil and the Group [are] a minor part of the total sales.") *Id.*, ¶11; Exhibit 1 at 11. No effort was made to furnish such readily available information as the names and addresses of major Shell Oil committees; the names of Shell Oil officers and their prior relationships with other group companies; the details concerning Shell Oil's sharing of research personnel with group companies; and the names of major research and development projects undertaken in conjunction with other group companies. Affidavit of Richard A. Watson ("Watson Aff."), ¶14.

At the next meeting with the auditor, on September 23, 1977, Shell representatives indicated that although they had collected requested data, their letter of September 6, 1977 constituted their response to the Board's questionnaire. Kashiwagi Aff., ¶12. They stated that they did not wish to give further responses and they asked the auditor to proceed to issue notices of proposed assessments. *Id.* The auditor objected to this procedure by letter dated September 30, 1977, and he also requested an extension of the

3. The questionnaires inadvertently asked for figures on intercompany sales by dollar value for each *transaction*, rather than by dollar value for each *year*, but Shell Oil representatives never objected to that request on the ground that it was too burdensome. Kashiwagi Aff., ¶8.

statute of limitations. *Id.* His request for an extension of the statute was repeated at a meeting on October 11, 1977. *Id.*, ¶13. Shell Oil representatives replied that they would not extend the statute and they again refused to furnish further responses to the questionnaire, indicating that they were declining to do so for internal reasons. *Id.*

On October 17, 1977, the auditor, having received no response to his repeated requests for information, sent Shell Oil an official Notice and Demand for Information. *Id.*, ¶14. On December 16, 1977, having still received no response, he issued Notices of Proposed Assessments for 1967-1971, including a 25 percent penalty for failure to furnish information on notice and demand. *Id.* The proposed assessments were based upon estimates derived from figures contained in the annual reports, with all doubts resolved in favor of the Franchise Tax Board. *Id.*

The audit of Shell Oil for income years 1972-1976 was commenced on October 26, 1977. *Id.*, ¶16. A letter dated October 18, 1977, was sent to Shell Oil confirming the appointment and requesting that certain information be available for the audit. *Id.* A questionnaire about unity was enclosed.

The extended statute of limitations date for issuing any proposed assessment for the 1972 tax period was March 15, 1978. *Id.*, ¶17. Shell Oil refused to grant a further extension of the statute of limitations for this year. *Id.* The auditor thereupon sent a Notice and Demand for Information on November 10, 1977, with a due date of December 16, 1977. *Id.* Shell Oil did not supply the requested data. *Id.* Since the company also refused to extend the statute of limitations, the auditor issued a Notice of Proposed Assessment for 1972 based upon the limited information in his possession, again with all doubts resolved in favor of the Franchise Tax Board. *Id.*[4]

Each of the Notices of Proposed Assessments for the years 1967-1972 contained the notation that the assessment was being issued "*because of the pending expiration of the statute of limitations.*"

4. It is the practice of the Board to include only active corporations in a combined report, and therefore passive holding companies are excluded. (Affidavit of Howard G. Vandeberg, "Vandenberg Aff.", ¶5.) In issuing the proposed assessments, the auditor assumed that SPNV was a passive holding company, and he attempted to exclude it from the combined report. Kashiwagi Aff. ¶23. If such passive holding company income was actually included in his figures for the worldwide combined income of the Royal Dutch/Shell companies, it was because he had insufficient information to exclude it. *Id.* See also Watson Aff., ¶5.

Affidavit of J. Lloyd Kennedy filed on behalf of SPNV ("Kennedy Aff."), Exhibits 3-8 (emphasis added).

On April 10, 1978, some four months after the initial assessments with penalties were issued, the auditor was notified by telephone that Shell Oil had decided to furnish the data requested in the questionnaire on unity. Kashiwagi Aff. ¶18. On April 20, 1978, he received a letter stating that Shell Oil representatives had requested certain information from SPNV, and that they would submit answers to the questionnaire in about four weeks. *Id.*, ¶19. On May 31, 1978, he received from Latham and Watkins, attorneys for Shell Oil, a response to the questionnaire which partially answered the Board's inquiries, but did not include information on the Royal Dutch group. *Id.*[5]

The field audit of Shell Oil for income years 1973-1976 was completed in 1979, but the Board has not issued any proposed assessments against Shell Oil for that period. *Id.*, ¶20. Meanwhile, there has also been an audit of Scallop Nuclear *Id.*, ¶21. No proposed assessments have been issued against Scallop Nuclear for *any* period. *Id.*

The protests of Shell Oil to the proposed assessments for 1967-1972 have been assigned to staff counsel of the Board for review. Watson Aff., ¶2. In connection with this protest, the staff counsel is also considering the validity of the auditor's determination that additions should be made to Shell Oil's tax liability for the years 1973-1976. *Id.* At the request of representatives of Scallop Nuclear, he also has agreed to consider the validity of the auditor's determination that Scallop Nuclear is involved in a single unitary business with other companies in the Royal Dutch/Shell group. *Id.*

Prior to the filing of this lawsuit, the Board's staff counsel met with Shell Oil representatives on at least two occasions, the last meeting being held on August 31, 1981. *Id.*, ¶¶6, 7. Shell Oil has indicated interest in the possibility of a settlement. *Id.*, ¶¶6, 11. In addition, as a result of fact finding and negotiation between Shell Oil, its outside representatives, and the Board's staff, numerous issues

5. In SPNV's statement of facts, it is implied that Shell Oil "made extensive informational submissions to the Board" prior to the issuance of the Notices of Proposed Assessments for 1967-1972. See Pet. at 6. Actually, Shell Oil did not submit a meaningful response to the Board's inquiries until *after* the proposed assessments were issued, its earlier response consisting of the 30-page letter of September 6, 1977 generally objecting to unitary treatment.

have been resolved. *Id.*, ¶6. Such issues involve multi-million dollar adjustments in the proposed assessments. *Id.*

Disposition Below

SPNV's description of the proceedings below is erroneous in several particulars.

First, neither the District Court nor the Court of Appeals considered the question of standing in terms of the two sub-questions indicated by SPNV: (1) whether SPNV has standing to raise its constitutional claims, and (2) whether SPNV has standing to raise its treaty-based claims. The courts below applied the rule that a stockholder who is injured only in his capacity as a stockholder has no standing to redress a wrong to the corporation in the absence of some provision of law which explicitly or impliedly creates an individual right of action. It was concluded that the Board's actions against the two corporate taxpayers, Shell Oil and Scallop Nuclear, will not injure SPNV directly or individually, and that, contrary to SPNV's assertion, standing is not conferred on it by the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands ("the FCN treaty").[6] Pet., App. at 3a, 5a.

Second, SPNV makes the following statement, partially quoting the District Court opinion:

> "Unwilling to 'strain to read into the Treaty an implied right . . . [in SPNV] not shared by other U.S. corporations', the Court concluded that SPNV could not claim any rights under the Treaty because only 'a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the [Netherlands FCN] Treaty'." Pet. at 10.

What the Court actually said was that the purpose of the FCN treaties was not "to accord *to the domestic subsidiaries of foreign parents* rights not shared by other U.S. corporations (emphasis added), and thus "the court [would] not strain to read into the Treaty an implied right of action by Netherlands shareholders of U.S. companies . . . . " Furthermore, the District Court did not hold that *only* a company of the Netherlands which itself transacts business in

6. Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, entered into force December 5, 1957, 8 U.S.T. 2043, T.I.A.S. No. 3942.

the United States falls within the zone of interests sought to be protected by the treaty. It said:

> "In the instant case, the treaty language upon which SPNV relies vests rights, if at all, in 'nationals and companies of the [Netherlands]'. *See* Article I(1); Article VI(3); Article XI(1), (3) and (4). It is clear that a company of the Netherlands which itself transacts business in the United States falls within the zone of interests sought to be protected by the Treaty; but it is also clear . . . that a U.S. corporation and its foreign parent are not mere extensions of each other, for Treaty purposes."

The District Court concluded, in other words, that the treaty provisions were inapplicable in this case because U.S. corporations are not companies of the Netherlands. It did not make a general holding that would exclude from all treaty protection all Netherlands companies which do not actively transact business in the United States.

Finally, the Court of Appeals did not specifically hold, as SPNV states, that the Tax Injunction Act is inapplicable to SPNV's claims.

REASONS WHY THE WRIT SHOULD BE DENIED

I

THE LOWER COURTS' HOLDINGS ON STANDING AND RIPENESS ARE FULLY CONSISTENT WITH ESTABLISHED PRINCIPLES AND THUS DO NOT PRESENT IMPORTANT QUESTIONS OF LAW WHICH NEED TO BE RESOLVED BY THIS COURT.

SPNV seeks by this petition to carry a disagreement with the State of California to this Court under the aura of importance surrounding a question left unresolved in *Container Corp.* v. *Franchise Tax Board*, 103 S. Ct. 2933 (1983). That question, of course, is whether a state's use of the unitary business/formula apportionment method of determining taxable income violates the Foreign Commerce Clause when applied on a worldwide combination basis to domestic subsidiaries of a foreign parent. A second issue presented in the case which SPNV deems to be of international concern arises from its claim that the unitary business/formula apportionment method is prohibited in this instance by Article XI, ¶4 of the Dutch FCN treaty. Additionally, SPNV claims that the decision of the Court

of Appeals has created a new issue of international concern, namely "whether the entire body of FCN treaties can be enforced in the Federal courts." Pet. at 13.

It will be demonstrated below that the only issue of any substance arising in the case is that concerning the Foreign Commerce Clause. That issue was never reached by the lower courts, however, it being determined that SPNV lacks standing to challenge the tax treatment of its domestic subsidiaries, Shell Oil and Scallop Nuclear, and, further, that the proposed tax treatment of those companies is too indefinite at this point to satisfy the requirements of ripeness. Both of those determinations are fully consistent with established principles. Accordingly, they do not present important questions of law which need to be resolved by this Court.

A. The Standing Question.

In his concurring opinion in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), Justice Stewart said that he could not then "imagine a case, at least outside the First Amendment area, where a person whose own [ ] tax liability was not affected could ever have standing to litigate the tax liability of someone else." 426 U.S., at 46 (STEWART, J., concurring). This is precisely what SPNV is attempting to do in the present case. It is not the aggrieved taxpayer. Rather, it is attempting to question the tax treatment of Shell Oil and Scallop Nuclear, two companies in which it holds an interest.[7]

1. The standing issue is whether SPNV may challenge the Board's actions against Shell Oil and Scallop Nuclear.

SPNV contends that the issue here is whether it has standing "to raise its treaty-based or constitutional claims" in Federal court. Pet. at 3; see also Pet. at 10-11. This characterization of the standing question is imprecise.

---

7. As pointed out in the amicus curiae brief filed on behalf of the Government of the Netherlands (Neth. Amicus Curiae Brf. at 12), this Court noted in *Container* "that the fact the legal incidence of a tax falls on a corporation whose *formal* corporate domicile is domestic might be less significant in the case of a domestic corporation that was *owned* by foreign interests." 103 S. Ct., at 2956, n. 32 (emphasis added). The quoted remark did not relate to a question of standing. Furthermore, the described situation would hardly encompass state taxes asserted against Shell Oil, a widely-held company which has more than 30,000 stockholders in addition to SPNV.

As this Court stated in *Valley Forge College* v. *Americans United*, 454 U.S. 464 (1982), there is no barrier to the assertion of such claims in a Federal court, "[b]ut assertion of a right to a particular kind of government conduct . . . cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." 454 U.S., at 483. It is a "bedrock requirement" of a justiciable case or controversy "that a litigant have 'standing' to challenge *the action sought to be adjudicated* in the lawsuit." *Id.* at 471 (emphasis added); see also *Sierra Club* v. *Morton*, 405 U.S. 727, 731 (1972) (standing question is "whether the [complainant] has alleged facts that entitle it to obtain judicial review of the challenged action").

Thus, the issue here is not whether SPNV has standing to raise its treaty-based and constitutional claims, but whether SPNV has standing to challenge the Board's tax treatment of Shell Oil and Scallop Nuclear.[8] Indeed, the treaty-based claims of SPNV already have been considered, and they have been rejected at an early stage of the litigation on the ground that the treaty is inapplicable. The treaty provisions have necessarily come into question at this point because they bear upon SPNV's asserted entitlement to standing, as well as upon the merits of its claim that the treaty is being violated.[9]

2. SPNV lacks standing under the settled rule that only a corporation and not its stockholders can complain of injury or wrong done to the corporation.

In a rather cavalier approach, SPNV makes use of a footnote to criticize the District Court's reliance "on the fact that SPNV can be

8. Both SPNV and the Government of the Netherlands complain that it is illogical for the Board to treat SPNV and its U.S. subsidiaries as parts of a unitary enterprise, yet to deny that SPNV has standing to challenge that treatment. Pet. at 21; Neth. Amicus Curiae Brf. at 3, 11. The argument is based on the erroneous assumption that the Board has determined that SPNV and all of its subsidiaries and affiliates constitute a unitary enterprise. On the contrary, the Board has made only a preliminary determination that Shell Oil and Scallop Nuclear *may* be part of a unitary enterprise composed of the operating companies of the Royal Dutch/Shell group of companies. In addition, the argument is self-defeating. If SPNV, Shell Oil and Scallop Nuclear were to be treated as a "unit" for standing purposes, it seems clear that SPNV's action would be barred by the Tax Injunction Act. See *infra* at n. 26.

9. It is to be noted that even if SPNV has properly framed the standing question, there would remain the further question whether it has stated a claim on which relief can be granted. This again would require an examination of the treaty provisions.

characterized as a shareholder of its subsidiaries." Pet. at 20, n. 24. This, of course, is the whole point. The fact that SPNV is a shareholder attempting to enforce what is actually a corporate cause of action is a major reason its lawsuit is doomed.

The principle that only a corporation and not its stockholders can complain of injury or wrong done to the corporation has been honored by this Court since the early days of its history. See, e.g., *Davenport* v. *Dows*, 85 U.S. 626 (1874); *Hawes* v. *Oakland*, 104 U.S. 450 (1882); *Huntington* v. *Palmer*, 104 U.S. 482 (1882); see also *Forbes* v. *Memphis*, 9 F. Cases 408 (F. Case No. 4,926) (1872); *Langdon* v. *Hillside Iron & Coal Co.*, 41 F. 609 (1890).[10] The rule has just as much force today as it ever did. If the cause of action is the corporation's, the corporation is a necessary party, and relief must be sought either directly by the corporation or through a derivative action brought on its behalf. *Ross* v. *Berhard*, 396 U.S. 531, 538 (1970); *Koster* v. *Lumbermans Mutual Co.*, 330 U.S. 518, 522-523 (1947); *Meyer* v. *Fleming*, 327 U.S. 161, 167 (1946). Thus, while a stockholder may seek to vindicate rights belonging to him individually, he may not seek on his own to vindicate rights belonging to the corporate entity. See, e.g., *Gregory* v. *Mitchell*, 634 F. 2d 199, 202 (5th Cir. 1981); *Sherman* v. *British Leyland Motors, Ltd.*, 601 F. 2d 429, 439-440 (9th Cir. 1979); *Smith* v. *Martin*, 542 F. 2d 688, 690 (6th Cir. 1976), cert. den. 431 U.S. 905 (1977); *VonBrimer* v. *Whirlpool Corp.*, 536 F. 2d 838, 846 (9th Cir. 1976); *Vincel* v. *White Motor Corp.*, 521 F. 2d 1113, 1119 (2d Cir. 1975). Nor can the rule be avoided by an allegation of injuries to the stockholder which are the indirect result of wrongs against the corporation. See *Pittsburgh & W. Va. Ry.* v. *U.S.*, 281 U.S. 479, 486-487 (1930). A stockholder may bring an individual action only "where the wrong itself amounts to a breach of duty owed to the stockholder personally." *Schaffer* v. *Universal Rundle Corporation*, 397 F. 2d 893, 896 (5th Cir. 1968); see also *VonBrimer*, *supra*, at 846; *McDaniel* v. *Painter*, 418 F. 2d

10. Coincidentally, both *Davenport* and *Huntington* involved an action by a stockholder seeking injunctive relief against an assertion of taxes against the corporation in which he held an interest. In *Davenport*, this Court held that a demurrer to the complaint should have been sustained since the corporation itself was not made a party to the suit. In *Huntington*, it held that a demurrer to the complaint had been properly sustained since the stockholder had not satisfied the requirements of a derivative suit.

545, 547 (10th Cir. 1969).[11]

The cases dealing with stockholder standing constitute a line of authority separate from that dealing with standing as an Article III requirement.[12] However, the legal basis for the general rule is that a stockholder is not personally injured by a wrong done to the corporation; his rights are derivative. *Pittsburgh & W. Va. Ry.*, *supra*, at 487. Thus, if an analogy to the standing requirement of Article III is appropriate, a stockholder under such circumstances does not suffer a cognizable "injury in fact." Article III requires that "the plaintiff who seeks to invoke judicial power stand to profit in some *personal* interest." *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 436 U.S., at 40 (emphasis added) see also *Warth* v. *Seldin*, *supra*, 422 U.S., at 498; *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S., at 99. A stockholder complaining of injury to the corporation does not have a personal interest at stake even though he may be economically affected by the corporate injury. *Pittsburgh & W. Va. Ry.* v. *U.S.*, *supra*, at 487.

Furthermore, in order for standing to exist, "[t]he injury or threat of injury must be both 'real' and 'immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); see also *Simon*, *supra*, at 44-46. A finding of "injury in fact" to SPNV in the present case requires speculation not only as to the possible effects of the Board's actions upon SPNV's interest, but speculation

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11. SPNV, citing *American Power & Light Co.* v. *S.E.C.*, 325 U.S. 385, 389-391 (1945), says that this Court has recognized that a stockholder can sue individually when he suffers a unique injury. In *American*, however, the injury to the stockholder did not flow from an injury to the corporation and there was a statutory provision which specifically granted a right of review to "any person . . . aggrieved" by the challenged action. In the absence of a comparable provision of law, even a *sole* stockholder has not been permitted to sue in his own right when he has been injured indirectly in his capacity as a stockholder. See, e.g., *Sherman* v. *British Leyland Motors, Ltd.*, *supra*, 601 F. 2d at 439-400.

12. The District Court nevertheless employed Article III terminology in deciding the standing question. After stating that SPNV's allegations satisfied the "injury in fact" requirement (presumably because of the possible diminution in the value of its stockholdings), the Court went on to cite two prudential limitations on standing: the "zone of interest" limitation and the limitation which generally requires a plaintiff to assert his own legal rights and interests. It then concluded:

> "The requirement that a shareholder establish injury to rights specifically vested in it individually, distinct from those of the corporation, is undoubtedly a prudential rather than a constitutional one. It might or might not be a particular instance of the more general prudential standing principles quoted above. But in any event, the requirement must be satisfied." Pet., App. 16a, n. 6.

as to *what* actions will be taken by the Board. SPNV could hardly have asserted that there was a case or controversy in the constitutional sense when the Board's auditor was merely inquiring into the question of unity. The fact that the auditor was forced to issue proposed assessments against Shell Oil because that company refused to cooperate at the last moment should not be enough to open the courtroom doors.

Reference to what SPNV terms "traditional standing analysis," Pet. at 18, also brings SPNV face-to-face with two prudential limitations on standing: the "zone of interest" limitation and the limitation which generally requires a plaintiff to assert his own legal rights and interests. It is true, for example, that the Dutch FCN treaty provides protections to companies of the Netherlands, and that SPNV is such a company, but it does not follow that treaty protections are applicable in the present instance. For purposes of this lawsuit, SPNV is not even "arguably" within the "zone of interests" protected by the treaty provisions on which it relies if those provisions do not pertain to the assertion of taxes against Shell Oil and Scallop Nuclear.

3. The Board's actions against Shell Oil and Scallop Nuclear do not threaten any individual rights of SPNV.

a. Rights which SPNV may hold under the Dutch FCN treaty do not pertain to either federal or state taxation of domestic subsidiaries.

SPNV claims that it has standing to challenge the Board's actions against Shell Oil and Scallop Nuclear because they infringe upon SPNV's rights under the FCN treaty between the United States and the Netherlands.[13] More specifically, it contends that the Board's use of the unitary business/formula apportionment method to de-

13. In October of 1979, the Government of the Netherlands lodged an official protest with the Secretary of State, charging that the practices of the Franchise Tax Board are contrary to provisions of the FCN treaty and accepted principles of international law. See Note from Charge d'Affaires a.i. of the Netherlands to the Secretary of State dated September 18, 1979 (Affidavit of Benjamin F. Miller ("Miller Aff."), Exhibit 2). The Department of State replied that it was "not in a position to conclude that the practices complained of are inconsistent with either the standards set forth in the Treaty or general principles of international law." Letter from Secretary of State to the Ambassador of the Netherlands dated December 20, 1979 (*Id.*, Exhibit 3).

termine the tax liability of Shell Oil and Scallop Nuclear violates rights held by SPNV under Article XI, ¶4 of the treaty. SPNV also contends that the Board has infringed upon SPNV's rights under Article I, ¶1, by not according "fair and equitable" treatment to SPNV and its enterprises, and upon its rights under Article VI, ¶3, by unreasonably impairing SPNV's interests in its two subsidiaries.[14]

Article XI, ¶4 of the treaty provides that,

> "In the case of companies or nonresident nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories . . . ."

The claim that this provision prohibits the use of formula apportionment with respect to taxation even of companies of the Netherlands is strained at best; it is also contradicted by the documented history of the FCN treaties. More significant for present purposes, the further notion that the treaty imposes limitations upon the manner in which either the Federal Government or the states may tax corporations organized under the laws of this country is foreclosed by the unanimous decision of this Court in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982).

SPNV asserts, in effect, that the Dutch and other FCN treaties long ago accomplished *sub silentio* what has been publicly debated in Congress and elsewhere for years: an outlawing of the states' use of formula apportionment in an international context. It arrives at this conclusion through the following syllogism: the separate accounting approach developed in various double taxation conventions has

14. Additionally, SPNV says that it seeks to show that informational demands of the Board violate SPNV's rights under the treaty. Pet. at 23-24. No applicable treaty provision is cited. In any event, the Board's informational demands have been directed to Shell Oil, not to SPNV, and any sanctions for failure to furnish requested information will fall on Shell Oil, not SPNV. While SPNV colorfully asserts that "Shell Oil is being held hostage to coerce SPNV to submit to the Board's demands," Pet. at 24, it is to be noted that penalties were included in the proposed assessments against Shell Oil for income years 1967-1972 after that company refused to supply even readily available information on its own operations. Once the assessments were issued, Shell Oil had a change of heart and submitted a meaningful response to the Board's inquiries. Whether the Board, under these circumstances, would see fit to impose additional penalties in any assessments for subsequent years is a matter of conjecture.

achieved the stature of international law; the modern FCN treaties are based upon principles of international law; therefore, the tax article of the FCN treaties incorporates the separate accounting requirement.

SPNV's reasoning does not survive analysis. There is no canon of international law which imposes a strict territorial limitation on the power to tax, much less a canon of international law which embodies the accounting methods developed in various tax treaties for attribution and allocation of income among nations. The accounting methods which have been adopted in the various tax treaties pertain to corporations conducting business within another country and reflect an effort to curb double taxation at the international level—a problem which results from the very fact that there is *no* international law limiting the taxing powers of a sovereign nation over persons and objects within its control.[15] Certainly, international law does not purport to dictate how a country shall tax its own citizens and residents.

Moreover, the diplomatic history of the FCN treaties negotiated by the United States, including the treaty with the Netherlands, establishes beyond any doubt that the Federal Government has regarded the "reasonably allocable or apportionable" language contained in provisions such as Article XI, ¶4 as expressing a general principle of fair attribution of income without requiring any specific method of accounting.[16] Indeed, in an annotated draft of the FCN treaty with Portugal prepared by Herman Walker, Jr., the chief architect of the modern FCN treaties, it was recognized that the "reasonably allocable or apportionable" language embraced the

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15. See Deperon, *International Double Taxation*, the Advisory Committee on Economics to the Committee on International Economic Policy, League of Nations (1945) at 6; see also *Burnet* v. *Brooks*, 288 U.S. 378, 399-400 (1933).

SPNV also exaggerates the situation when it says that the unitary method is "internationally condemned." Pet. at 22. Both the model double taxation convention issued by OECD (Organization for Economic Co-Operation and Development) in 1977 and the model convention issued by the United Nations in 1980 permit the use of formula apportionment when it has been customarily employed in a contracting state. See United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, U.N. Doc. ST/ESA/102 (1980) at 93-96.

16. See, e.g., Airgram from the Department of State to the Embassy at The Hague dated July 3, 1953 (Miller Aff., Exhibit 9); HICG Bonn Despatch No. 2255 of February 17, 1954 (*Id.*, Exhibit 8).

unitary method of taxation then used by various states of the Union.[17]

SPNV runs into even greater difficulties with its assertion that the tax article of the Dutch FCN treaty limits the manner in which the State of California may determine the tax liability of Shell Oil and Scallop Nuclear. Paragraph 4 of the article imposes limitations only on the taxation of companies of the other contracting party. The taxes in question here are not being asserted against SPNV; it is even doubtful that SPNV's income has been or would be included in the apportionment base used to determine the tax liability of Shell Oil and Scallop Nuclear. It follows that Paragraph 4 is operative in the present case only if Shell Oil and Scallop Nuclear qualify as companies of the Netherlands for purposes of the treaty, a proposition which is foreclosed by the decision of this Court in the *Sumitomo* case. There it was held that language in the FCN treaty with Japan identical to that contained in Paragraph 4 referred only "to companies of one of the Treaty countries operating in the other country," 457 U.S., at 182, and that a locally incorporated subsidiary of a Japanese company was "a company of the United States, not a company of Japan." *Id.*[18]

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17. See Annotated Draft FCN for Portugal prepared by Herman Walker, 1947-1948, at 14a (Miller Aff., Exhibit 7); see also Memorandum to the American Embassy at Chungking for Use in Negotiating Treaty of Friendship, Commerce and Navigation with China (Miller Aff., Exhibit 5); Memorandum to the American Embassy at Rio de Janeiro for Use in Negotiating Treaty of Friendship, Commerce and Navigation between the United States and Brazil (*Id.*, Exhibit 6).

SPNV erroneously asserts that the Convention of Establishment between the United States and France, entered into force December 21, 1960, 11 U.S.T. 2923, T.I.A.S. No. 4625, specifically adopts the arm's length method of accounting. Pet. at 17. The language in the French treaty permitting taxation of "income . . . derived from sources [within the taxing jurisdiction]" is equivalent to language in other FCN treaties permitting taxation of income "reasonably allocable or apportionable" to the taxing jurisdiction. Furthermore, the United States made it clear during negotiation of the treaty that it sought "[o]nly a declaration of general principle, rather than any predetermined apportionment formula," see Paris Despatch No. 2001 of April 22, 1959 (Affidavit of David R. Milton filed on behalf of SPNV ("Milton Aff."), Exhibit 5, at 3), and the Senate was assured during ratification proceedings that the French treaty contained "no innovations raising problems as to their effect upon domestic law." (S. Exec. Rep. No. 12, 86th Cong., 2d Sess. 5 (1960).)

18. Article VI, ¶1 of the FCN treaty provides that "companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the

Aside from the controlling precedent in the *Sumitomo* case, the notion that the FCN treaty imposes limitations on the taxation of domestic companies is totally implausible. First, as this Court recognized in *Container*, domestic companies generally are excepted from the provisions of the double taxation conventions executed by the United States. See 103 S. Ct. at 2956. It is inconceivable that the Federal Government intended to compromise its taxing powers over domestic corporations through the broader provisions contained in the tax article of the Dutch FCN treaty and others like it. Second, it is inconceivable that the Federal Government intended by Article XI, ¶4 of the treaty to confine its taxing powers over Shell Oil and Scallop Nuclear to income "reasonably allocable or apportionable" to the United States; in other words, to surrender its right to tax Shell Oil and Scallop Nuclear, as it does other domestic corporations, on their income "from whatever sources derived." 26 U.S.C. §61. Third, federal law taxes the total income of both domestic corporations and resident individuals. If Article XI, ¶4 were construed as applying to domestic corporations, an immediate schism would be created—i.e., while residents who were nationals of the Netherlands would be taxed on their total income, domestic subsidiaries of Netherlands companies would be taxed only on income "reasonably allocable or apportionable" to this country. Again, it is inconceivable that such a radical departure from internal tax policy was ever contemplated.

Finally, even as a general proposition, it would make little sense to construe Article XI, ¶4 as pertaining to domestic corporations. The purpose of the FCN treaty provisions is "to assure that corporations of one treaty party have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity." *Sumitomo*, *supra*, at 188. Locally incorporated subsidiaries of foreign companies are fully protected simply because they have the status of domestic subsidiaries, and as such "are entitled to the rights . . . of other domestic corporations." *Id.*

Whether SPNV may claim standing by virtue of the FCN treaty thus boils down to whether such standing is conferred by Articles I,

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medium of any form of juridical entity." This does not imply, as SPNV would have it, see Pet. at 19, that a Netherlands company is engaged in business here simply because it holds a majority interest in a United States corporation. Nor does it imply that provisions such as Article XI, ¶4 pertain to corporations organized under the laws of this country.

¶1 and VI, ¶3. Article I, ¶1 provides that,

> "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, *and to their property, enterprises and other interests*." (Emphasis added.)

Article VI, ¶3 provides that,

> "Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, *whether in their capital, or in their enterprises and the property thereof*." (Emphasis added.)

Although both of the quoted provisions expressly relate to the treatment of "companies of the other Party," as does Article XI, ¶4, SPNV argues that the italicised language entitles it to complain of the Board's actions against Shell Oil and Scallop Nuclear because they are its "enterprises" in which it holds interests.

Assuming, however, that Shell Oil and Scallop Nuclear are "enterprises" of SPNV for treaty purposes,[19] it does not follow that SPNV is entitled to object to their domestic tax treatment in a Federal court. Carried to its logical extreme, it is SPNV's theory that any Dutch national owning stock in an American corporation may bring suit against the United States or one of the several states to correct what he deems to be unfair taxation of the corporation's income. The claim is untenable, particularly in view of the fact that the FCN treaty accords nationals and companies of the Netherlands *national* treatment with respect to access to the courts. See Article V, ¶1.

In addition, SPNV has never indicated what purpose would be served by permitting Netherlands stockholders to complain of "unfair" taxation of U.S. corporations, which are perfectly capable of asserting such complaints on their own. Domestic corporations partly or wholly owned by nationals or companies of the Netherlands do not stand at the mercy of the United States or any of the several states—thus threatening the "rights" of their Netherlands stockholders—merely because their Netherlands stockholders are unable to voice their discontent with domestic tax policies in a

19. Actually, the language "their . . . enterprises," as used in Article I, ¶1 and Article VI, §3 and elsewhere in the treaty, appears to refer to businesses conducted by Netherlands companies rather than to domestic companies which they may control. See, in particular, the second sentence of Article VIII, ¶1.

judicial forum. The only possible objective of a stockholder action is avoidance of the Tax Injunction Act. It is undoubtedly for this reason that the District Court, in considering the standing question, said that the "salutory purposes [of the Act] should be kept in mind." Pet., App. at 12a.

b. The tax treatment of Shell Oil and Scallop Nuclear does not involve any distinct constitutional rights of SPNV.

SPNV also says that it is attempting to assert "its" rights under the Foreign Commerce and Due Process Clauses. What those rights might be has never been clear. SPNV, after all, is a company of the Netherlands which neither does business in the United States nor has a permanent establishment here. See Pet. at 3-4, n. 5.[20]

If the Board's actions in the case involved an assertion of taxes against SPNV's stockholdings in Shell Oil and Scallop Nuclear, or some other action directed against SPNV, it might be possible for SPNV to make out a claim that rights secured to it by the Constitution were threatened. Cf., *United States* v. *Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 491-492 (1931). Here, however, the challenged actions of the Board are not directed against SPNV, but against Shell Oil and Scallop Nuclear. Thus, SPNV is not in the same position as the foreign entities in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), who were challenging taxes assessed against *them* with respect to *their* property.

For the first time in its Petition, SPNV also suggests that it has standing because the Due Process Clause protects it against double taxation of the worldwide income in which it has a beneficial interest. See Pet. at 21-22 & n. 26. Aside from the dubious status of SPNV under the Due Process Clause, the argument has a number of flaws. First, if it is doubtful, as SPNV states, that Shell Oil and Scallop Nuclear could complain of such double taxation because they will be presented with only one tax bill, it should be all the more doubtful that SPNV has standing to complain when it will receive no tax bill at all. Second, the earnings of SPNV's subsidiaries and affiliates are not "assets" of SPNV. See *Rhode Island Hospital Trust*

20. Cf., Exchange between the Bench and Stuart A. Smith, Office of the Solicitor General, at oral argument in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co., et al.*, No. 81-349, April 19, 1982:

"QUESTION: We don't usually rely on foreign governments to tell us what violates the commerce clause, do we?

"MR. SMITH: That is true. . . . " (Tr. of Oral Arg. 19.)

Co. v. *Doughton*, 270 U.S. 69, 81 (1926). Third, the alleged injury to SPNV would not be unique; any stockholder of Shell Oil owning stock in another Royal Dutch/Shell company would be similarly affected. Fourth, the argument that the Due Process Clause protects against double taxation of intangibles was discarded more than 40 years ago, see, e.g., *Mobil Oil Corp.*, *supra*, 445 U.S., at 445, and the contrary theory apparently was never applied in the international context. See, e.g., *Burnet* v. *Brooks*, *supra*, 288 U.S., at 400-405. Finally, SPNV has erroneously assumed that an American parent corporation suffering the same "unique injury" would have standing to complain of the Board's actions. For reasons already explained, this is simply not the case. See *supra, at 11-14.*

If the Board should finally determine that either Shell Oil or Scallop Nuclear are part of a unitary enterprise, and issue final assessments on that basis, it may be that such assessments will be open to challenge on the Due Process ground that they attribute to California an amount of income out of all proportion to the taxpayer's activity within the state. Obviously, either Shell Oil or Scallop Nuclear would be able to attack any assessment on this ground. Either would also be free to complain that the tax assessments are invalid under the Foreign Commerce Clause.[21]

4. The lower courts properly declined to read the treaty provisions as creating an implied right of action in SPNV.

The lower courts declined to read into the FCN treaty an implied right of action in SPNV, the Court of Appeals tersely stating:

"A domestic corporation holding a majority interest in Shell Oil or Scallop would not have standing in this case as the injury

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21. The same would be true of any claims of invalidity based on provisions of the FCN treaty. In oral argument before the District Court, counsel for the Board made a statement to the effect that, if Shell Oil and Scallop Nuclear were to challenge any tax assessments against them in the state courts, the Board would argue, as it has done throughout the federal litigation, that the FCN treaty does not apply to the taxation of domestic corporations. The fact that California would take that adversary position obviously would not preclude the treaty claims from ever being raised. See Neth. Amicus Curiae Brf. at 4; see also Pet. at 24-25. It also bears repeating that the District Court and Court of Appeals have not prevented *SPNV* from asserting rights under the treaty. The search for a distinct, individual injury sufficient to entitle SPNV to have standing to complain of actions against the corporate taxpayers has necessitated a consideration of the treaty provisions on which SPNV relies. Those provisions have been found not to vest any rights in SPNV in the present situation.

> complained of is not direct or individual. The Treaty places SPNV in the same position as a domestic corporation: it has no standing." Pet., App. 5a.

SPNV excitedly claims that the rationale employed by the Court "has threatened to undermine the entire complex of FCN treaties into which this nation has entered." Pet. at 13. This charge is based on what SPNV conceives to be the Court of Appeals' determination that the treaty "provides solely for national treatment." *Id.*

The Court of Appeals was, of course, dealing with the standing question. It held, in this regard, that SPNV is entitled to no greater rights than a U.S. corporation under similar circumstances. That reasoning is unassailable in view of the fact that nationals and companies of the Netherlands are granted, under the very treaty on which SPNV relies, *national* treatment with respect to access to the courts.

It should be evident that this standing determination does not threaten any absolute substantive protections which the treaty may grant to companies of the Netherlands. To use SPNV's example, if the State of California were attempting to confiscate SPNV's interest in Shell Oil or Scallop Nuclear without just compensation, there would be a threatened invasion of a legal right held by SPNV under the treaty. The fact that a U.S. corporation might not be entitled to just compensation under the same circumstances would have no bearing upon SPNV's ability to seek relief in a court of law, just as a citizen or resident may resort to the courts to redress a legal injury. The problem here is that SPNV does not have the substantive protections it claims; there is no treaty provision which imposes limitations on the taxation of domestic corporations in which a company of the Netherlands holds an interest. Consequently, SPNV has no greater right to complain of such taxation than would a U.S. company owning a similar interest.

B. The Ripeness Question.

The case or controversy requirement set forth in Article III of the Constitution demands that the issues sought to be adjudicated in a lawsuit be "ripe" for judicial resolution. This means that the harm asserted must have "matured sufficiently to warrant judicial intervention." *Warth* v. *Seldin*, *supra*, 422 U.S., at 490, n. 10. With particular reference to administrative action, the basic rationale "is to prevent the courts, through avoidance of premature adjudication,

from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging party." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

In the present case, the Court of Appeals accurately described both Shell Oil and Scallop Nuclear as being "in early phases of the administrative proceedings." Pet., App. at 6a. The Board has issued *no* assessments against Scallop Nuclear. It has issued only *proposed* assessments against Shell Oil for only some of the years in question, and then only because of the taxpayer's lack of cooperation. From the inception of the audit, it was understood that the question of unity would have to be pursued. After repeated requests for information, and as the statute of limitations was about to expire for the 1967-1972 tax periods, representatives of Shell Oil declined to furnish any meaningful response to the Board's inquiries, though much of the information was within their own knowledge and control. They also refused to extend the statute of limitations. The auditor assigned to the Shell Oil account accordingly had no choice; he was forced to protect the revenue by issuing proposed assessments which not only treated Shell Oil as part of a unitary enterprise, but resolved all other doubts in favor of the Board. It is these assessments which SPNV has the temerity to call "the conclusion of the audit process." Pet. at 29.

The issuance of the proposed assessments did, of course, provoke a formal protest by Shell Oil. That protest has been assigned to a staff counsel for the Board, who is reviewing the unitary question with respect to both Shell Oil and Scallop Nuclear.[22] Multi-million dollar reductions in the assessments already have been proposed as the result of the administrative review which has not yet been completed. Meanwhile, it has not been finally determined what, if any, additional taxes are owed by Shell Oil or Scallop Nuclear—or even whether Shell Oil, Scallop Nuclear and the other Royal Dutch/Shell companies constitute a unitary enterprise. Assuming

22. Since no assessments at all have been issued against Scallop Nuclear, there has been no occasion for it to pursue any of the administrative remedies prescribed by statute. The legal counsel for the Board who has been assigned to review the protests of Shell Oil has agreed, with the consent of the agency, to consider the unity question with respect to Scallop Nuclear prior to issuance of an assessment. See Watson Aff., ¶2.

the taxpayers are dissatisfied with the ultimate determination, they may, if they wish, pursue further administrative remedies before the State Board of Equalization.[23]

SPNV nevertheless insists that the present controversy is ripe for adjudication when viewed against the two considerations deemed pertinent in the *Abbott* case—i.e., "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S., at 49.

SPNV states that it has satisfied the first part of this analysis because "the issues raised by SPNV's complaint present purely legal questions." Pet. at 28. This is not entirely accurate. For example, in pvragraph 54 of the complaint, SPNV alleges that "[d]uring the relevant period neither [Shell Oil nor Scallop Nuclear] was engaged in an integrated business with any of the more than 900 Royal Dutch/Shell companies," certainly a mixed question of law and fact. More importantly, a court generally decides legal issues in a concrete factual setting, not in the abstract. Here, the factual circumstances are uncertain and in a state of flux; indeed, as a result of the administrative proceedings still underway, the issue of unitary treatment could very well be resolved in the taxpayers' favor, thus mooting the entire controversy.

The lack of ripeness is reflected in SPNV's own argument. It says, for example, that one of the basic issues in the case is: Does unitary taxation *as asserted* by California violate SPNV's rights under the Netherlands FCN treaty?" Pet. at 28 (emphasis added). Does SPNV mean "as asserted" in the proposed assessments against Shell Oil? Obviously not, since SPNV's complaint demands judgment "enjoining defendants . . . from proceeding with any further assessments against Shell Oil . . . using the Royal Dutch/Shell companies as the unitary reporting body." Prayer of Complaint, subparagraph (4). SPNV, therefore, must be referring to *any* tax which might be asserted under the unitary theory. But how could a court possibly determine that *any* such tax, regardless of amount, would be so "unfair" as to be invalid under Article I, ¶1 of the treaty?

Equally unavailing is SPNV's argument that the hardship to the parties of withholding court consideration is substantial. For one thing, SPNV says, the proposed assessments against Shell Oil have

23. In the alternative, either taxpayer could pay the asserted liability, file a claim for refund, and then proceed directly to the California courts if no action were taken on its claim within six months. See Cal. Rev. & Tax. Code §26103a.

forced the initiative on the taxpayer. While this is true, it is water over the dam, the proposed assessments having been issued some six years ago. Secondly, it is claimed that "SPNV is threatened with immediate harm because it has been and will continue to be coerced to produce vast quantities of information at great expense." Pet. at 29. Tiresome as it may sound, SPNV has not been asked, begged or coerced by the Board to do anything. The harm which SPNV envisions is based on its own supposition that, unless information on the Royal Dutch/Shell companies is forthcoming, additional penalties will be asserted against Shell Oil for subsequent years. No such threat has been made by the Board.[24]

SPNV also attempts to establish error below by asserting that the Court of Appeals "has created a requirement of exhaustion of remedies in contravention of this Court's longstanding rule that a plaintiff need not exhaust state administrative and judicial remedies before bringing suit under 42 U.S.C. §1983." Pet. at 26. It cites, in particular, the recent decision of this Court in *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), and says that such a requirement of exhaustion is especially inappropriate when the remedies must be pursued by another party. Contrary to what the Court of Appeals seemed to believe, it continues, the policies of the Tax Injunction Act do not warrant "this aberrational interpretation of the ripeness doctrine." Pet at 25.

In *Patsy*, this Court reaffirmed the general rule that exhaustion of state administrative remedies is not required in actions brought under 42 U.S.C. §1983.[25] *Patsy*, however, was not a state tax case; this is. As pointed out in the concurring opinion in *Fair Assessment in Real Estate Ass'n. Inc.* v. *McNary*, 454 U.S. 100 (1981), the exhaustion of state administrative remedies has long been regarded as a precondition to a federal suit challenging the validity of a state tax. It was stated:

> "... while this Court has repeatedly reaffirmed that exhaustion of administrative remedies is not a precondition to

24. Similarly, the claim that "the Board has had all information needed to make a unitary decision with respect to Shell Oil and certain non-United States Royal Dutch/Shell companies for over five years," Pet. at 28, n. 34, is an unwarranted assumption of SPNV. The Board's investigation of unitary ties between Shell Oil and other group companies was halted for several years after settlement discussions with Shell Oil began; it has not been completed.

25. In the present case, it is even questionable whether jurisdiction was properly invoked under the section. See *supra* at 20-21.

a suit brought under the Civil Rights Acts [citations omitted], that conclusion rests firmly on the understanding that such was the intention on Congress in enacting §1983. * * *Where the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action, or is in accord with congressional policy, not only is §1983 no bar, but the federal courts should be alert to further these policies.

"We plainly have sufficient evidence of such congressional policy here. * * * [T]he administrative-exhaustion requirement is entirely consonant with the principal purposes of the [Tax Injunction] Act: to provide assurance that federal courts exercise at least the same restraint in dealing with questions of state tax administration as the courts of the State that levied the tax. Where administrative remedies are a precondition to suit for monetary relief in state court, absent some substantial consideration compelling a contrary result in a particular case, those remedies should be deemed a precondition to suit in federal courts as well." 454 U.S., at 136-137 (BRENNAN, J., concurring).

The relief sought in *Fair Assessment* was money damages. Where, as in this case, the plaintiff seeks injunctive and declaratory relief, it seems clear that the policies underlying the Tax Injunction Act should be accorded particular respect. The fact that the plaintiff has no administrative remedies to pursue because he is not the taxpayer strongly suggests that he has no business in court in the first place. In any event, to require such a plaintiff to wait out the administrative proceedings that involve the actual taxpayer does not seem too much to ask.[26]

As final support for the argument that the pendency of state administrative proceedings should be disregarded in this case, both SPNV and amicus curiae cite *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). SPNV characterizes the case as standing for the proposition that "a district court may assert jurisdiction and determine the power of an administrative agency before the agency has completed its proceedings when the

26. From the outset of this litigation, the Board has argued that SPNV's suit is barred by the Tax Injunction Act. The purposes of the Act obviously are frustrated if it is read as permitting a stockholder to challenge a state tax assessment when the corporate taxpayer directly concerned is barred from doing so. This is especially true once it has been determined that the stockholder has no independent rights to assert.

controversy 'has aroused vigorous protests from foreign governments and created international problems for [the United States] Government.'" Pet. at 29 (brackets in original). However, the narrow question presented in *McCulloch* was whether the review provisions of the National Labor Relations Act constituted an exclusive remedy for challenging an action of the National Labor Relations Board which was allegedly beyond its authority. Thus, it was not the pendency of administrative proceedings which was of concern, but the statutory prerequisite to judicial review of an administrative order. As the District Court properly recognized here, *McCulloch* does not stand for the broad proposition that a Federal court may "brush aside doctrines of nonjusticiability merely because the subject of an action affects overseas interests." Pet., App. at 23a.

II
EXPEDITED CONSIDERATION OF THE CONSTITUTIONAL CLAIMS WOULD BE INAPPROPRIATE.

Asserting that this case "cries out [for adjudication]... in the most expeditious manner possible," Pet. at 30, SPNV suggests in closing that, if its petition be granted, the Court should consider directing the parties to brief the underlying issues. SPNV's petition comes at a time, however, when the possible accommodation of competing demands of the states and various foreign entities has been entrusted to a specially created Presidential commission. The present efforts of the Executive Branch to find a workable solution to the sensitive issues raised by worldwide apportionment would seem to caution against the expedited judicial consideration sought here, even if it should be determined that the lower courts erred on the questions of standing and ripeness.

Following this Court's decision in *Container*, considerable pressure was exerted on the Government of the United States to support Container's petition for rehearing.[27] President Reagan, reportedly commenting that "Federal intervention in state tax matters is objectionable in principle,"[28] rejected that proposal in favor of the establishment of a Working Group to explore the use by the

27. See Wall Street Journal (Western Ed.), September 28, 1983, at 8, col. 2.

28. See The Sacramento Bee, September 14, 1983, at A 13, col. 1.

states of the worldwide unitary method of taxation. This group, chaired by Secretary of the Treasury Donald T. Regan, is charged with producing recommendations "that will be conducive to harmonious international economic relations, while also respecting the fiscal rights and privileges of the individual states."[29]

The accommodation sought by the Administration entails just the sort of balancing process in which this Court has found itself ill-equipped to engage. As pointedly observed in *Container*, "This Court has little competence in determining precisely when foreign nationals will be offended by particular acts, *and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please*." 103 S. Ct., at 2955 (emphasis added).

Compounding the problem is the fact that the results of the study underway presumably will be utilized by the Chief Executive to decide whether there should be a *change* in this country's foreign policies with respect to state taxation of income. In its dealings with foreign nations, the Federal Government to date has not deemed it essential that the states follow its lead even in the taxation of foreign companies. As this Court noted in *Container*, the tax treaties between the United States and various foreign countries do not cover the taxing activities of the states. *Id.*, at 2956. Indeed, the United States has formally stated its reservations to provisions in model double taxation conventions issued by OECD and the United Nations which would apply the terms of such conventions, including their preference for the separate accounting/arm's length method of allocation, to taxes imposed by political subdivisions.[30] As this Court also noted in *Container*, Congress has thus far refrained from imposing limitations on the state's taxation of income, and an effort to include a restrictive provision in the 1978 double taxation convention with Great Britian failed to receive Senate approval. 103 S. Ct., at 2956. Finally, the Federal Government has been solicitous of the state's taxing powers in drafting the tax articles of the modern FCN treaties, which apply to the states as well as to the Federal Gov-

29. See Statement of Donald T. Regan, Secretary of the Treasury, September 23, 1983, reproduced in the accompanying Appendix A. Also reproduced in the Appendices are a press release announcing the names of those invited to serve on the Working Group and a second release announcing the final membership. Although Shell Oil was among the invitees, it apparently declined to participate.

30. See United Nations, *Model Double Taxation Convention*, supra, at 49.

ernment. The United States has taken the position that language such as that contained in Article XI, ¶4, of the Dutch FCN treaty (restricting the taxation of income to that amount "reasonably allocable or apportionable" to the taxing jurisdiction) is intended to state a general principle of fair allocation without specifying the means by which the states are to accomplish that result.[31]

In sum, the United States has heretofore given a negative answer to the inquiry whether a state's lack of conformity with the Federal Government's method of taxing the income of foreign corporations is impermissible "because it '[ ] impair[s] uniformity in an area where federal uniformity is essential'" and "'prevents the Federal Government "from speaking with one voice" in international trade.'" *Container*, at 2955. Surely, if there is to be a fundamental shift in policy, and in particular, a curtailment of state taxing powers over *domestic* corporations, that action must be initiated by Congress or the Executive Branch, not this Court. In addition, the factual development in this case is woefully inadequate to serve as a framework for the second inquiry under the Foreign Commerce Clause: whether the application of the unitary concept on a worldwide basis to Shell Oil and Scallop Nuclear would create an

31. See *supra*, at 16-17. Of the do uments made available to the parties by the Department of State, those pertaining to the FCN treaty with West Germany (which, incidentally, was being negotiated at the same time as the treaty with the Netherlands) best spell out the views of the United States on the subject. When the two countries had entered into a double taxation convention, the Germans had expressed their desire that its provisions apply to taxes levied by the individual states as well as the Federal Government. The Germans again raised that issue during the negotiation of the FCN treaty. The U.S. negotiators informed them that it was the *policy* of the United States to enter into binding commitments only with respect to federal taxes, and that,

> "... taxation, within the framework of the FCN treaty, was considered in terms of non-discriminatory and equitable treatment. It was not the intention of the United States to go beyond this purpose and determine what specific formulas the individual states had to adopt in order to achieve this aim." HICG Bonn Despatch No. 2255 of February 17, 1955 (Miller Aff., Exhibit 8).

The further suggestion that this Court solicit the views of the United States on the propriety of granting SPNV's petition raises an interesting specter. If the United States were to declare its disagreement with the Government of the Netherlands that Article XI, ¶4 of the Dutch FCN treaty "incorporates the internationally accepted arm's length principle with respect to domestic subsidiaries of foreign companies," Neth. Amicus Curiae Brf. at 6, it would appear that this Court would be ousted of jurisdiction to decide the question since the treaty itself provides that interpretative differences which cannot be resolved through diplomacy shall be referred to the International Court of Justice. See Article XXV, ¶2.

impermissible risk of double taxation. What, if any, additional taxes will finally be asserted by California against either of those companies is not even known.[32]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

November 10, 1983

Respectfully submitted,
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32. This Court pointed out in *Container* that "Whether the combination of [the arm's length and formula apportionment] methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case." 103 S. Ct., at 2952. SPNV takes issue with that view, saying that, as stated by Justice Powell in the dissenting opinion, "'double taxation is inevitable' under California's unitary tax system, as applied in the international context." Pet. at 21. On at least two occasions however, Shell Oil representatives have informed a California legislative committee that application of the unitary concept to the Royal Dutch/Shell group may actually reduce Shell Oil's tax liability to California in the long run. See Testimony of John Walker, reproduced in California's Bank and Corporation Tax Vol V, *Interim Hearing on Unitary Method of Taxation*, Assembly Revenue and Taxation Committee (1980) at 98; Letter of E.M. McCracken, Jr., dated August 28, 1980, reproduced in California's Bank and Corporation Tax Vol. IV, *Unitary Method of Apportionment: A Second Look*, Assembly Revenue and Taxation Committee (1980) at 34.

Appendix A

TREASURY NEWS
Department of the Treasury • Washington, D.C. • Telephone 566-2041

Statement by Donald T. Regan
Secretary of the Treasury
September 23, 1983

President Reagan decided to refrain from filing a motion for rehearing in the Container Corporation case and to establish a Working Group composed of representatives of the Federal government, state governments, and the business community. This Group will explore the state's use of the worldwide unitary method of taxation.

In order to develop policies to resolve the complex issues involved, I will establish the high level Working Group called for in the President's decision.

This group, which I will chair, will be charged with producing recommendations in a relatively short time that will be conducive to harmonious international economic relations, while also respecting the fiscal rights and privileges of the individual states. The Working Group will consider the views of our trading partners who are seriously concerned about this issue.

The challenge to this body will be formidable. However I am confident a fair and workable solution can be found to this sensitive and emotional tax issue.

[Text reprinted to conform to type-size requirements.]

FACT SHEET

Working Group on Worldwide Unitary Taxation

The Working Group, which will include representatives from the federal government, state governments, and the U.S. business community, will explore state use of the worldwide unitary method of taxation. The Working Group's objective will be to develop a federal policy that is conducive to harmonious international economic relations while respecting the fiscal rights and privileges of individual states.

Based on a detailed Cabinet-level review, the Administration has concluded that this issue can be solved only by a cooperative effort of the affected parties. The tri-partite Working Group will give a full and complete hearing to all sides of the issue and will consider the views of our trading partners who are seriously concerned about this issue. The Working Group will be charged with developing a broadly-acceptable solution.

In its review, the Working Group will consider the following issues:

(1) A consistent and appropriate definition of a unitary business;
(2) The application of the three-factor formula in an international context, including its impact on international income flows;
(3) Uniform rules and standards to alleviate administrative burdens while respecting state fiscal sovereignty;
(4) An equitable resolution to the problems raised by foreign governments and foreign-based multinationals;
(5) The treatment of intercorporate dividends;
(6) Federal-state sharing of tax information, including transfer pricing adjustments;
(7) Uniform reporting requirements and joint state audits;

(8) The desirability of federal legislation implementing the above; and

(9) The possibility of convening a conference with our trading partners to receive their views and recommendations.

The worldwide unitary method of taxation is used by about 13 states to determine the taxable income of a business operating across state and national borders. Under this approach, income from related corporations, whether domestic or foreign, is combined to determine the worldwide taxable income of the unitary business. A portion of this worldwide taxable income is then attributed to the unitary state on the basis of in-state business activity relative to total or worldwide business activity. If, for example, one-third of the worldwide business activity, generally measured by sales, payroll, and property, occurs in the unitary state, one-third of the worldwide taxable income would be attributed to that state. The worldwide unitary method is different from the separate accounting or "arm's-length" method used by other states, the federal government, and most foreign countries. Under this approach, a state taxes a multinational corporation by allocating income among related corporations according to "arm's-length" or unrelated party prices.

September 23, 1983

Appendix B

TREASURY NEWS

Department of the Treasury • Washington, D.C. • Telephone 566-2041

FOR IMMEDIATE RELEASE
Friday, September 30, 1983

CONTACT: Charles Powers
556-2041

Statement by Treasury Secretary Donald T. Regan on Unitary Taxation

Secretary of the Treasury Donald T. Regan has invited representatives of all groups involved in the states' use of the worldwide unitary method of taxation to a meeting at the Treasury Department on October 7, 1983.

The purpose of this *informal discussion* is to produce constructive ideas and suggestions *for the development of* the *official working group* on unitary taxation.

President Reagan last week asked the Treasury Secretary to establish and chair a high-level working group to explore and attempt to resolve the complex issues involved in the unitary method of taxation.

[List of invitees and telegram of invitation attached.]

[Text reprinted to conform to type-size requirements.]

President Reagan has asked me to establish a high-level working group to explore and attempt to resolve the complex issues involved in the states' use of the worldwide unitary method of taxation. This group, which I will chair, will be composed of representatives of the federal government, state government, and the business community. Its mission is to develop as quickly as possible a federal policy conducive to harmonious international economic relations while respecting the fiscal rights and privileges of individual states, their need for revenues, as well as considering the views of our trading partners.

In order to explore the issues involved, I would like to invite you to attend a meeting on Friday, October 7, 1983, from 10:30 a.m.-12 noon in room 4426 at the Treasury Department. It is my hope that this informal discussion, which will include representatives of all the groups involved, will produce constructive ideas and suggestions for an official working group on unitary taxation. A letter of confirmation follows.

Please contact Assistant Secretary of the Treasury Bruce Thompson at (202) 566-8191 regarding your acceptance and detailed arrangements.

Donald T. Regan

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(217) 782-6830

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Governor Scott Matheson—(D) Utah
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Appendix C

TREASURY NEWS

Department of the Treasury • Washington, D.C. • Telephone 566-2041

FOR IMMEDIATE RELEASE
October 28, 1983

CONTACT: Charles Powers
(202) 556-2041

Treasury Announces Membership of Worldwide Unitary Taxation Working Group

Secretary of the Treasury Donald T. Regan today announced the membership of the Worldwide Unitary Taxation Working Group. This group, composed of representatives of the federal government, state governments, and the business community, will advise the Treasury and assist in the development of a policy dealing with the complex issues involved in the states' use of the worldwide unitary method of taxation.

The first public meeting of the Working Group, which will be chaired by Secretary Regan, will be held on Wednesday, November 2, 1983, at 10:30 a.m. in the Cash Room of the Treasury Department. Charles E. McLure Jr., Deputy Assistant Secretary of the Treasury (Tax Analysis), will serve as the Group's Staff Director. The members of the Working Group are as follows:

Mr. John R. Opel
Chairman and Chief
Executive Officer
International Business
Machines
Old Orchard Road
Armonk, New York 10504

The Honorable
James Thompson
Governor of Illinois
Springfield, IL 61706

Mr. Philip Caldwell
Chairman and Chief
Executive Officer
Ford Motor Company
The American Road
Dearborn, Michigan 48121

The Honorable
George Deukmejian
Governor of California
State Capitol
Sacramento, CA 95814

[Text reprinted to conform to type-size requirements.]

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Exxon Corporation
1251 Avenue of the Americas
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Mr. Edmund T. Pratt, Jr.
Chairman
Pfizer, Inc.
235 East 42nd Street
New York, New York 10017

Mr. Robert E. Gilmore
President
Caterpillar Tractor Company
100 N.E. Adam Street
Peoria, Illinois 61629

Mr. Charles I. McCarty
Chairman and Chief Executive Officer
BATUS, Inc.
2000 Citizens Plaza
Louisville, Kentucky 40202

Ms. Norma Pace
Senior Vice President
American Paper Institute
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Mr. Owen L. Clarke
National Association of Tax Administrators
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The Honorable
Scott Matheson
Governor of Utah
Salt Lake City, Utah 84114

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Mr. David E. Nething
National Conference of State Legislatures
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Washington, D.C. 20001

Mr. Lee Moffitt
Speaker of the Florida House
Florida State Capitol
Room 420
Tallahassee, Florida 32301

Mr. John B. Tucker
Speaker of the New Hampshire House
16 Edwin Street
Claremont,
New Hampshire 03743

The following federal government representatives will assist the Chairman:

The Honorable
John Chapoton
Assistant Secretary
(Tax Policy)
U.S. Treasury Department

The Honorable
W. Allen Wallis
Under Secretary for
Economic Affairs
Department of State

The Honorable
John A. Svahn
Assistant to the President
for Policy Development
The White House

Mr. Robert B. Hawkins, Jr.
Chairman
Advisory Commission
on Intergovernmental
Relations
1822 21st Street
Sacramento, CA 95814

DEPARTMENT OF THE TREASURY

Office of the Secretary

WORLDWIDE UNITARY TAXATION WORKING GROUP ESTABLISHMENT AND MEETING NOTICE

Pursuant to the Federal Advisory Committee Act (PL. 94-463) the Department of the Treasury announces the establishment and a meeting of the Worldwide Unitary Taxation Working Group.

The Working Group, composed of representatives of the Federal government, state governments, and the business community, will advise and assist in the development of a policy dealing with the complex issues involved in the states' use of the worldwide unitary method of taxation. It is in the public interest that this tax issue affecting our individual states and our trading partners be resolved in a fair and workable manner by a cooperative effort of the affected parties.

The Working Group will meet at *10:30 A.M.* on November 2 in the Cash Room of the Main Treasury Building. The purpose of the meeting is to define the work plan and develop a time frame for deliberations. The agenda includes the following topics for discussion:

1. A consistent and appropriate definition of a unitary business.
2. The application of the three-factor formula in an international context, including its impact on international income flows.
3. Uniform rules and standards to alleviate administrative burdens while respecting state fiscal sovereignty.
4. An equitable resolution to the problems raised by foreign governments and foreign-based multinationals.

5. The treatment of intercorporate dividends.
6. Federal-state sharing of tax information, including transfer pricing adjustments.
7. Uniform reporting requirements and joint state audits.

Inquiries concerning the Working Group should be addressed to Charles McLure, Room 3108, Main Treasury, 15th & Penn., N.W., Washington, D.C. 20220, Telephone 566-2563.

John E. Chapoton
Assistant Secretary
(Tax Policy)

Dated: Oct. 2, 1983